

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EUGENE MYRICK)	
)	
)	CIVIL ACTION
v.)	
)	
DONALD T. VAUGHN, et al.)	NO. 03-3214

Padova, J.

MEMORANDUM

September __, 2003

Before the Court is Eugene Myrick's pro se Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). For the reasons that follow, the Court will adopt the Report and Recommendation of Magistrate Judge Jacob P. Hart, and dismisses the Petition in its entirety as untimely.

I. RELEVANT BACKGROUND

In January, 1988, Petitioner Eugene Myrick was convicted of murder in the first degree and possession of an instrument of the crime. Petitioner was sentenced to life imprisonment on the murder charge, as well as two and one half to five years on the weapons charge. The Pennsylvania Superior Court affirmed the judgment of sentence on May 31, 1989. Commonwealth v. Myrick, 563 A.2d 193 (Pa. Super. 1989). Petitioner did not file for allocatur with the Pennsylvania Supreme Court.

On January 16, 1997, Petitioner filed a petition pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"). Retained counsel filed an amended petition, and the PCRA court denied relief

on November 16, 2001. The Pennsylvania Superior Court subsequently denied relief on Petitioner's PCRA petition on September 10, 2002. Commonwealth v. Myrick, No. 331 EDA 2002. The Pennsylvania Supreme Court denied allocatur on December 18, 2002. Commonwealth v. Myrick, No. 536 EAL 2002.

Petitioner filed the instant Petition on May 21, 2003, asserting the following four claims: his trial counsel was ineffective for failing to colloquy him regarding certain incriminating evidence; he was denied his right to appeal; the Commonwealth obtained the conviction through the use of perjured testimony; and the Commonwealth struck veniremen from Petitioner's jury panel in a racially discriminatory manner.

II. THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636, the Court referred this case to Magistrate Judge Jacob P. Hart for a Report and Recommendation. The Magistrate Judge recommended that the instant Petition be dismissed as untimely, pursuant to 28 U.S.C. § 2244(d) ("§ 2244(d)".) Section 2244(d) provides for a one year statute of limitations for the filing of federal habeas corpus petitions. With certain exceptions, the one year period begins to run on the date on which the state court judgment becomes final, and is tolled only by a properly filed application for post conviction relief or collateral review. 28 U.S.C. § 2244(d)(1)(A) & (d)(2).

The Magistrate Judge found that the one year statute of

limitations began to run in this case on April 24, 1996, the enactment date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). See Burns v. Morton, 134 F.3d 109, 110 (3d Cir. 1998)(holding that any period prior to the enactment date of the AEDPA should not be included in the one-year statute of limitations calculation). The Magistrate Judge further noted that Petitioner had filed a PCRA petition on January 16, 1997, after 267 days of the one year statute of limitations had run. The Magistrate Judge therefore found that the statute of limitations was tolled from January 16, 1997 until December 18, 2002, when the Pennsylvania Supreme Court denied allocatur of Petitioner's PCRA petition. The Magistrate Judge further found that 98 days of the one year statute of limitations remained on December 18, 2002, leaving Petitioner until March 26, 2003 to file a timely petition. Petitioner did not file his petition until May 21, 2003, over 50 days late.

III. DISCUSSION

Petitioner does not object to the Magistrate Judge's calculation of the running of the statute of limitations. Rather, Petitioner objects to the Magistrate Judge's Report and Recommendation based upon equitable tolling grounds. Specifically, Petitioner asserts that he made "every reasonable effort" to file his petition in a timely manner, and should therefore be excused for filing the Petition late. (Pet's Obj. at 2.)

The one year statute of limitations found in § 2554 for the

filing of habeas corpus petitions is subject to equitable tolling. Miller v. New Jersey State Dept. of Corr., 145 F.3d 616, 619 (3d Cir. 1998). Equitable tolling is only appropriate "when the 'principles of equity would make [the] rigid application [of a limitation period] unfair." Id. (citing Shendock v. Dir., Office of Workers Comp. Programs, 893 F.2d 1458, 1462 (3d Cir. 1990))(alteration in original). The United States Court of Appeals for the Third Circuit ("Third Circuit") has therefore held that equitable tolling is only appropriate in certain narrow circumstances: 1) the defendant has "actively misled" the plaintiff; 2) the plaintiff has been prevented from asserting his rights "in some extraordinary way"; 3) the plaintiff mistakenly asserted his rights in the wrong forum in a timely manner; 4) the plaintiff "received inadequate notice of her right to file suit, where a motion for appointment of counsel is pending, or where the court has misled the plaintiff into believing that she had done everything required of her." Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (citations and internal quotation marks omitted). Moreover, equitable tolling is to be invoked sparingly, United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998), and can only be invoked when the petitioner establishes that he exercised reasonable diligence in pursuing his claims. Miller, 145 F.3d at 618-19.

In this case, Petitioner asserts that, after he received the

December 18, 2002 order from the Supreme Court of Pennsylvania informing him that his petition for allowance of appeal had been denied, he attempted to contact an attorney, Cheryl J. Strum, to represent him. Petitioner further asserts that Ms. Strum misled him into thinking that she would represent him, and failed to inform him of the impending deadline for his habeas corpus petition. In support of this assertion, Plaintiff points to a series of letters written by him to Ms. Strum, in which he indicates his desire to provide payment for Ms. Strum's services and asks Ms. Strum for legal advice concerning, inter alia, when the statute of limitations for his habeas corpus petition would expire. (See Pet's Obj., "Exhibits"). Significantly, however, Petitioner does not provide any copies of letters written from Ms. Strum to him concerning his case. Thus, there is nothing in the record, besides Petitioner's own bald assertions, to indicate that Ms. Strum misled Petitioner concerning either the amount of time left for him to file a habeas corpus petition or the fact that she would represent him. Indeed, the three letters from Petitioner to Ms. Strum do not reference any legal advice given to Petitioner from Ms. Strum concerning his case. Thus, there is nothing in the record to indicate that Petitioner's attorney or any other person actively misled him in any manner, or to suggest that he was prevented from exercising his rights "in some extraordinary way". See Jones, supra, 195 F.3d at 159.

Petitioner also indicates that he experienced a three month delay in receiving the December 18, 2002 order from the Pennsylvania Supreme Court denying his right to appeal. (See Pet's Obj. at 4th page.) However, Petitioner's own submissions contradict this assertion. Specifically, a letter from Petitioner to Ms. Strum, dated December 26, 2002, indicates that: "Attached is copy of the Order I received from the Supreme Court of Pennsylvania denying my Petition for Allowance of Appeal." (Pet's Obj., Ex. 9.) Consequently, there is nothing in the record to indicate that Petitioner's failure to file his petition in a timely manner was the result of the failure of the state courts to provide Petitioner timely notice of the status of his case.

Finally, Petitioner asserts that counsel he retained after he filed his pro se PCRA petition in state court was ineffective in assisting him as he pursued his claims. (See Pet's Obj. at 2nd page.) However, the effectiveness of Petitioner's PCRA counsel is not relevant to the timeliness of his habeas corpus petition, because the one year statute of limitations was tolled during the entire period while Petitioner's PCRA petition was pending. See 28 U.S.C. §2244 (d)(2). Thus, any delay in the PCRA proceedings that may have been caused by the ineffectiveness of Petitioner's PCRA counsel did not affect the timeliness of the instant habeas corpus petition.

IV. CONCLUSION

For the foregoing reasons, the Court adopts the Report and Recommendation of Magistrate Judge Jacob P. Hart, and dismisses the Petition in its entirety as untimely.